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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE OF MINNESOTA, *et al.*,
Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENTS FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA

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QUESTION PRESENTED

Whether Chippewa rights of "hunting, fishing and gathering the wild rice" guaranteed in the Treaty of July 29, 1837, 7 Stat. 536, were silently abrogated when Minnesota was admitted to the Union on an equal footing with the original thirteen states in 1858.

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BRIEF FOR RESPONDENTS FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA

Respondents Fond du Lac Band of Lake Superior Chippewa Indians and Red Cliff Band of Lake Superior Chippewa submit this brief in response to Petitioners' argument that Minnesota's admission to the Union extinguished the rights to hunt, fish and gather that the Chippewas expressly reserved in the Treaty of July 29, 1837, 7 Stat. 536, with the United States.[1]

[1] In addition to equal footing, Petitioners also argue that the 1837 Treaty rights were terminated by an 1850 executive order and, as to the Mille Lacs Band, by a cession of land under an 1855 treaty. These issues are addressed in the Brief for Respondents St. Croix Chippewa, Lac Courte Oreilles Band and Sokaogan Chippewa Community and the Brief for Respondent Mille Lacs Band which we incorporate by reference.

STATEMENT OF THE CASE

This case involves core Indian interests secured by treaty and at the heart of Chippewa culture, religion and identity—the right to hunt, fish and gather as the Chippewa have done from time immemorial, without interference from state laws that regulate sport and recreational uses. By Treaty of July 29, 1837, in exchange for the Chippewa Bands' agreement to cede land in present-day Wisconsin and Minnesota, the United States "guarantied" to the Chippewa the right to continue to hunt, fish and gather on the ceded territory. Specifically, Article 5 of the Treaty recites:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.

PA 486. On May 11, 1858 the State of Minnesota was admitted to the Union. The statehood act, 11 Stat. 285, PA 515, provides that Minnesota is "admitted into the Union on an equal footing with the original States in all respects whatever," and that "all laws of the United States which are not locally inapplicable shall have the same force and effect within the State as in other States of the Union. . . ." *Id.* at section 3.

The District Court upheld the continuing vitality of the rights guaranteed in Article 5 of the 1837 Treaty. PA 350. The District Court further held the State can regulate the exercise of the treaty right but only to the extent necessary for conservation of the resources, public health or public safety. PA 344-45.[2]

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[2] The case was initially brought by the Mille Lacs Band. PA 214. The Wisconsin Bands of Chippewa that were parties to the 1837 Treaty intervened, and the court's rulings were applied to them. PA 210. Likewise, in a separate suit the District Court's rulings were applied to the Fond du Lac Band. PA 478.

Following the District Court's decision, the Bands and Minnesota reached agreement, set out in a stipulation and related documents,[3] that resolved "the vast majority" [4] of regulatory issues of concern to the State.[5] Under this agreed-upon regulatory regime, responsibility for regulating the Indians is on the Bands, but all Band activities in that regard are subject to State oversight. *E.g.*, JA 1733-34 paras. 3, 4, 6. Failure on the part of the Bands to adopt or effectively enforce those rules results in the automatic application of state law to Band members hunting, fishing or gathering in the ceded territory. JA 1733 para. 3; PA 81. By the stipulation, the parties agreed to the federal court's continuing jurisdiction, JA 1736 para. 12, and to procedures by which the Bands and State would seek to resolve disputes without judicial

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[3] *See* JA 1727-84; PA 80-81; PA 58 n.44.

[4] State Defendants' Memorandum in Response to Bands' Motion on Regulatory Issues, September 13, 1996 at 2, Docket Entry No. 768 in *Mille Lacs v. Minnesota*. The State joined the Bands in asking that the District Court enter an order incorporating the terms of the stipulation, provided that it be part of the final judgment. *Id.*; *see also* PA 83-84. In making this request, the State informed the court that "the documents included with the Stipulations address the *vast majority* of regulatory issues for which the State has the burden of evaluating the conservation, public health and safety concerns." State Mem. *supra*, at 2 (emphasis supplied).

[5] For example, under the stipulation and the code it approves, because of the importance of deer to Band subsistence and cultural practices, Band members are allowed a longer season to hunt deer than provided by state law, but the total Band harvest of deer is subject to annual ceilings and bag limits, as well as limits on the number of deer that can be taken from any one of the state's deer management zones. *See* JA 1771; *see also* Docket Entry No. 689 in *Mille Lacs v. Minnesota*, at Ex. A, §§ 6.02, 6.03, Ex. C at p. 2. Similar restrictions are imposed on fishing. Band members are permitted to use traditional means for harvesting fish, such as nets and spears, but the resource is protected by the imposition of strict per lake and per species harvest limits, which are enforced by the Bands through on-site monitoring of the catch. *E.g.*, *id.* at Ex. A, § 9.05; JA 1762-63.

intervention. *See, e.g.*, JA 1742-45. The few regulatory issues on which the Bands and the State could not reach agreement were presented to the District Court for resolution. The District Court decided these issues by applying settled law to the specific facts and evidence presented. *See* PA 85-87, 92-101, 114-116.

Minnesota, and the Counties and Landowners who intervened in the suit, appealed, alleging that the Bands' rights were extinguished by, *inter alia*, an 1850 executive order, an 1855 Treaty, and the equal footing doctrine. *See* PA 21-39, 52-59. Minnesota did not challenge any aspect of the District Court's rulings on regulatory issues.[6] The State assured the Court of Appeals that the regulatory framework established by the stipulation and the District Court's rulings did not have *any* detrimental effect on the natural resources.[7] A unanimous panel of the Eighth Circuit affirmed the District Court's decisions.

SUMMARY OF ARGUMENT

The decision below correctly held that the 1837 Treaty right was not extinguished by Minnesota's admission to the Union in 1858. The State, the Landowners and the Counties advance the same argument here, relying primarily on *Ward v. Race Horse*, 163 U.S. 504 (1896). They contend that the 1837 Treaty right is irreconcilable with the State's sovereign right to regulate the taking of fish and game, and that it was extinguished when Minnesota entered the Union on an equal footing in 1858. They further contend that *Ward* established a rule under which a right reserved by treaty does not survive state-

[6] *See* Minnesota's Opening Brief before the Court of Appeals for the Eighth Circuit, dated April 28, 1997; Minnesota's Reply Brief dated May 27, 1997.

[7] *See* PA 65; *see also* Tape No. 1, Oral Argument Before the Eighth Circuit Court of Appeals, *Mille Lacs Band v. City of Aitkin*, No. 97-1957 MN, June 12, 1997.

hood if it is "temporary or precarious," and that when the federal government holds power to negate a treaty right, it is "temporary and precarious." Applying their self-constructed rule here, they assert that the 1837 Treaty right is such a right, and was extinguished upon statehood.

This argument is wrong on three separate grounds. First, all states enter the Union subject to the Federal Constitution, and thus subject to the federal government's authority in Indian affairs and to the terms of the Supremacy Clause, U.S. Const., art. VI, cl. 2. In conformance with these principles, constitutionally valid exercises of federal power do not offend the equal footing doctrine, or interfere with state police power, including the power to regulate hunting and fishing. This is shown by two decisions that resolved the same issue posed here, whether Minnesota's admission to the Union extinguished treaty rights over ceded lands. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876); *Johnson v. Gearlds*, 234 U.S. 422 (1914). Additional authorities, including the landmark decisions in *United States v. Winans*, 198 U.S. 371 (1905) and *Winters v. United States*, 207 U.S. 564 (1908), and the more recent decision in *Antoine v. Washington*, 420 U.S. 194 (1975), confirm the same conclusion. This defeats the petitioners' reliance on *Ward* to support their equal footing claim.

Second, differences between the treaty right at issue in *Ward* and Article 5 of the 1837 Treaty make *Ward* inapplicable in any event. Article 5 guarantees the rights it reserves to the Chippewa, subject only to action of the President. In contrast, the right at issue in *Ward* was held to terminate by means that the Treaty did not control or restrain. *Ward*, 163 U.S. at 509-10. Treaty rights that are subject only to subsequent action by the President are not extinguished by statehood, as *43 Gallons*, *Johnson* and additional cases decided before and after *Ward* establish. This distinction also renders *Ward*'s descriptive ref-

erence to the treaty right before the Court as "temporary and precarious" inapplicable here.

Third, changes in the law since *Ward*, establish that that it may no longer be relied on to show that an off-reservation treaty right has been extinguished by a state enabling act. The perceived conflict, at the heart of *Ward*, between Indian rights and state regulatory authority has long been reconciled. *Tulee v. Washington*, 315 U.S. 681 (1942). Off-reservation treaty rights have been sustained but made subject to state regulation for conservation, public health or safety. Additionally, the foundation of *Ward*'s holding that the treaty right there at issue had been extinguished by the State Enabling Act—the absence of any mention of the treaty right in the enabling act—has been disavowed. It is now clear that the presence or absence of a reservation of Indian rights in a state enabling act is not sufficient to establish congressional intent as to the existence of such rights, as *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1982) shows. Finally, the decision in *United States v. Dion*, 476 U.S. 734 (1986), now requires that it be shown that Congress' intent to abrogate a treaty right was "clear and plain" before such a determination will be upheld. That standard was not, and cannot be met here.

ARGUMENT

I. THE UNITED STATES' CONSTITUTIONAL AUTHORITY IN INDIAN AFFAIRS, THE SUPREMACY CLAUSE AND REPEATED DECISIONS OF THIS COURT DEFEAT ANY CLAIM THAT THE OFF-RESERVATION HUNTING, FISHING AND GATHERING RIGHTS RESERVED BY ARTICLE 5 OF THE 1837 TREATY WERE EXTINGUISHED BY MINNESOTA'S STATEHOOD.

The State argues that the equal footing doctrine requires that the rights and sovereignty of all subsequently admitted states must be the same as that of the original 13,

and that such rights include the power to "completely regulate hunting and fishing within its borders . . . ." Br. at 29 (citing *Ward v. Race Horse*, 163 U.S. 504, 510 (1896)). The Landowners and the Counties join in these claims. Ld. Br. at 42-48; C.Br. at 43-47.

These contentions are defeated by three well-settled rules of law. The first is that all states, both the original 13 as well as those subsequently admitted, enter the Union subject to the Federal Constitution, and thus also subject to the federal government's constitutional authority in Indian affairs, and to the command of the Supremacy Clause, which declares Indian treaties to be the law of the land. The second is that limitations on state authority created by a constitutionally valid treaty do not offend a state's admission on an equal footing. As the original 13 states are subject to valid exercises of federal authority, so too are states admitted subsequently. The third is that, in conformance with this rule, Minnesota's admission to the Union on an equal footing did not invalidate Indian treaty rights, whether the treaty was entered into before or after statehood. This is shown by *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876) and *Johnson v. Gearlds*, 234 U.S. 422 (1914), and confirmed by decisions of this Court decided before and after *Ward*.

A. The Federal Government's Authority in Indian Affairs Is Constitutionally Based, and All States Are Subject to Its Exercise.

The constitutional authority of the federal government in Indian affairs was first addressed by Chief Justice Marshall in this Court's historic decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). At issue was whether a state law that prohibited white men from living in Cherokee territory without a state license was "consistent with, or repugnant to, the Constitution, laws and treaties of the United States." *Id.* at 541.

The Court began by examining the Treaties of Hopewell and Holston[8] and the congressional acts regulating trade and intercourse with Indian tribes, and found that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the union." *Id.* at 557. The question was then "[i]s this the rightful exercise of power, or is it usurpation?" *Id.* at 558. The Court addressed this question by comparing federal power over Indian relations under the Articles of Confederation with the Constitution's text on the same subject.

The Articles had imposed two limitations on the power of Congress over Indian affairs—"the Indians [must] not [be] members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated." *Id.* at 558-59; IX *Journals of the Continental Congress, 1774-1789*, at 919 (Lib. of Cong. ed. 1904-1937). These limitations led to disagreement.[9] As the Court explained, the limitations "were so construed by the states of North Carolina and Georgia as to annul the power itself." *Worcester*, 31 U.S. at 559. To avoid further conflict, the limitations contained in the Articles were omitted from the text of the Constitution.[10]

[8] Treaty of Hopewell, November 28, 1785, 7 Stat. 18; Treaty of Holston, July 2, 1791, 7 Stat. 39.

[9] While the Continental Congress asserted exclusive power to deal with Indian tribes, a number of states disputed this view and independently dealt with Indian tribes. *Journals, supra*, at XXXIII, at 455, 460.

[10] *See United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *see* U.S. Const., art. I, § 8, cl. 3. As this Court explained, the Framers recognized that those limitations "rendered the [federal] power of no practical value," and that "[t]he only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this . . . ." *43 Gallons*, 93 U.S. at 194; *accord*, *The Federalist No. 42*, at 217 (James Madison) (William R. Brock ed. 1992) (explaining that the Indian Commerce Clause was "properly unfettered from two limitations contained in the articles of Confederation").

Accordingly, the Court held "[t]he whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Worcester*, 31 U.S. at 561. The Georgia law was therefore void, "as being repugnant to the constitution, treaties, and laws of the United States . . . ." *Id.* at 562.[11]

The basic constitutional principles of *Worcester* remain the law. It is thus well-settled that "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester*, 31 U.S. at 561 (1832)); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715-16 (1943). So too is the rule that under the Constitution, treaties entered into between the Indian tribes and the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. *See Antoine v. Washington*, 420 U.S. 194, 206 (1975); *43 Gallons*, 93 U.S. at 196; *Worcester*, 31 U.S. at 559.

All states enter the Union subject to the Federal Constitution, and thus subject to these basic constitutional principles.

[11] The Supremacy Clause established that the state law was void by "declar[ing] treaties already made, as well as those to be made, to be the supreme law of the land . . . ." *Worcester*, 31 U.S. at 559.

B. Treaties That Reserve Rights on Ceded Lands Are Constitutionally Valid, and Do Not Offend a State's Admission to the Union on an Equal Footing, or Interfere With State Police Power, and the Cases so Holding Defeat the State's Reliance on *Ward v. Race Horse.*

There is no question that the 1837 Treaty rights are a valid exercise of the federal government's constitutional authority in Indian affairs, as the Court of Appeals correctly held. PA 56-57.[12] The State does not challenge that holding,[13] but instead asserts an equal footing attack

[12] To establish that the 1837 Treaty right was beyond the constitutional authority of the federal government would require at a minimum that it would be shown that the Treaty right was not "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). *See also Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977). No such showing was attempted, nor could one succeed in view of the importance of the right to the Chippewa, as well as to the cession that the United States sought and obtained by the Treaty. If such a claim were nonetheless made, the precedent discussed *infra* would plainly defeat it.

[13] The Landowners and Counties assert that the 1837 Treaty rights are invalid because they conflict with the Tenth Amendment. This claim, which is not made by the State, was rejected by the Court of Appeals, PA 58 n.44, and has no merit. As the power to enter into the Treaty plainly exists in Congress, "the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). Additionally, as we show in section II.A., *infra*, this Court has reconciled Indian off-reservation treaty rights and state regulatory authority over natural resources, making it clear that the constitutional power of the federal government to enter into treaties or agreements securing Indian hunting, fishing and gathering rights is not inconsistent with a state's police power, or its general power to regulate hunting and fishing. Thus the conflict on which this argument is based no longer exists. Furthermore, *New York* also makes it clear that when the State is given the choice of regulating according to federal standards or not regulating at all, the Tenth Amendment does not invalidate the federal enactment. *Id.* at 161, 167. There is no requirement of state regulation in the

against the Treaty, relying exclusively on *Ward v. Race Horse*. This attack is rejected by the decisions in *43 Gallons* and *Johnson*, which control the issue presented here. The State's claim is also defeated by this Court's decisions in *United States v. Winans*, 198 U.S. 371 (1905) and *Winters v. United States*, 207 U.S. 564 (1908), which reject equal footing attacks on Indian rights reserved by treaty and agreement, and by the decisions in *United States v. Thomas*, 151 U.S. 577 (1894) and *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906), which recognize that states enter the Union subject to pre-existing Indian treaty rights. These cases remain the law, as this Court's more recent decision in *Antoine v. Washington*, 420 U.S. 194 (1975) establishes, and show that a constitutionally valid treaty term does not offend a state's admission to the Union on an equal footing, or interfere with its police power to regulate hunting and fishing. In sum, *Ward* has no application to the 1837 Treaty rights.[14]

1. *Minnesota's Admission to the Union Did Not Extinguish Treaty Rights on Ceded Lands, as* 43 Gallons *and* Johnson *Hold.*

The State's claim that Minnesota's admission to the Union extinguished the 1837 Treaty rights is conclusively rejected by two decisions that construe the effect of Minnesota's admission on treaty rights over ceded lands, *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876) and *Johnson v. Gearlds*, 234 U.S. 422 (1914).

The claim in *43 Gallons* was that Article 7 of the Treaty of October 2, 1863, 13 Stat. 667, entered into

1837 Treaty. *Cf. Printz v. United States*, 521 U.S. ——, 117 S.Ct. 2365 (1997). Indeed, the State here voluntarily entered into a stipulation with the Bands that comprehensively addressed and resolved nearly all regulatory issues. *See infra* at section II.A.

[14] Even if this were not so, as we show below, *Ward* is also based on assumptions repudiated by subsequent decisions of this Court, and its application of these now invalid assumptions cannot be extended to this case.

after Minnesota's statehood, was unconstitutional and an invalid infringement on Minnesota's admission to the Union on an equal footing. 93 U.S. at 193, 197. Article 7 provided that the federal Indian country liquor laws were to remain in effect on the lands ceded by the Treaty, "until otherwise directed by Congress or the President of the United States." *Id.* at 193.

The Court held first, relying on *Worcester*, that the Treaty right was constitutionally valid, *id.* at 196, and then turned to the claim that Article 7 conflicted with Minnesota's admission to the Union on an equal footing. The Court rejected this claim, finding that the Treaty "does not rest on any ground which makes a distinction between the States, and the fact that the ceded territory is within the limits of Minnesota is a mere incident and not the foundation of the prohibition," and then holding that "there is no disturbance of the principle of state equality" as Article 7 was "based exclusively on the federal authority over the subject matter." *Id.* at 197.[15] Additionally, as the power of the United States to make treaties with Indian tribes was "co-extensive with the power to make treaties with foreign nations," the Court held that "surely the Federal Government can, in the exercise of its power to treat with Indians, make provisions over a subject like the present . . . ." *Id.*

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[15] These same principles were confirmed in *Dick v. United States*, 208 U.S. 340 (1908), in which the Court upheld the validity of a congressionally-approved agreement which provided that the land ceded by the agreement would remain subject to the federal liquor laws applicable to Indian country for a period of 25 years. *Id.* at 352-53. The Court rejected the defendant's claim that after Idaho's admission to the Union on an equal footing in 1890, its jurisdiction over the ceded lands was exclusive. *Id.* at 342. The Court reached the same result in *Perrin v. United States*, 232 U.S. 478 (1914), upholding a congressionally-ratified agreement between the Yankton Sioux and the United States that barred the sale of intoxicating liquor on ceded land in South Dakota, and rejecting the contention that the power to regulate the sale of intoxicating liquor rested exclusively with the State. *Id.* at 483-84.

The decision in *43 Gallons* was held to apply with equal force to a treaty entered into *before* statehood in *Johnson v. Gearlds*, 234 U.S. 422 (1914). The claim was that Article 7 of the 1855 Treaty, 10 Stat. 1165, which barred the introduction of liquor into lands that had been ceded by the Treaty "until otherwise provided by Congress," had been repealed by Minnesota's admission to the Union on an equal footing. This Court unanimously rejected that claim, holding:

> [W]e cannot agree with the District Court that article 7 of the treaty of 1855 was repealed by the Minnesota enabling act, or by the admission of that state into the Union upon equal terms with the other states . . . . The court seems to have considered that the continued existence of article 7, so far as it prohibited the introduction, manufacture, and sale of liquors within the ceded country outside of the reservations, was inconsistent with the "equal footing" clause of the enabling and admitting acts. *That there is no such inconsistency results very plainly, as we think, from the reasoning and authority of the cases above cited.* The court deemed that [these cases] were distinguishable upon the ground that in each . . . the treaty under consideration was made after the state had been admitted into the Union. *But if the making of such a treaty after the admission of the state is not inconsistent with the "equal footing" of that state with the others,—as, of course, it is not,—it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.*

Johnson v. Gearlds, 234 U.S. 422, 439 (1914) (emphasis added).

Johnson and *43 Gallons* are controlling with regard to the claimed effect of Minnesota's admission to the Union on the 1837 Treaty rights, which *Johnson* establishes are not inconsistent with the Minnesota enabling

and admitting acts and were not repealed by those acts. 234 U.S. at 439. These decisions also reject the State's attempt to characterize the 1837 Treaty rights as inadequate to survive statehood. Br. at 33-36. The treaty terms at issue in these cases were subject to subsequent action only by the Congress or the President, *43 Gallons*, or by Congress, *Johnson*. Article 5 of the 1837 Treaty makes an even stronger promise in a similar form, as it provides that the rights are "*guarantied* to the Indians, during the pleasure of the President of the United States." (Emphasis added.) As the rights in *Johnson* and *43 Gallons* survived statehood, so too did Article 5 of the 1837 Treaty.

This conclusion is confirmed by the test used in *43 Gallons* to determine whether the treaty right there at issue offended the state's equal footing. Article 5 "does not rest on any ground which makes a distinction between the States, and the fact that the ceded territory is within the limits of Minnesota is a mere incident and not the foundation of the prohibition." 93 U.S. at 197. Indeed, at the time of the Treaty the ceded lands were territorial lands, and were not included in Minnesota and Wisconsin until 1858 and 1848 respectively. So the Treaty can hardly be said to have singled out Minnesota. Thus, in this case, as in *43 Gallons*, "there is no disturbance of the principle of state equality" as Article 5 was "based exclusively on the federal authority over the subject matter." *Id.* Article 5 is also validated by the power of the United States to make treaties with Indian tribes, which is "co-extensive with the power to make treaties with foreign nations." *Id.*

The State's equal footing claim in this case is also rejected by the landmark decisions in *United States v. Winans*, 198 U.S. 371 (1905) and *Winters v. United States*, 207 U.S. 564 (1908). These cases establish that a state's admission to the Union on an equal footing does not terminate rights reserved by treaty or agreement.

In *Winans*, the Court rejected an equal footing attack on Article 3 of the Treaty of June 9, 1855, 12 Stat. 951, by which the Yakima Nation had reserved "the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them . . . ." 198 U.S. at 378. To interpret the Treaty, the Court examined the circumstances of its making in accordance with the rule that "the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted." *Id.* at 381. The Court held that the Indians had ceded lands under Article 1 of the Treaty, and had also reserved a right on the ceded lands of "taking fish at all usual and accustomed places." *Id.* at 378. These rights were not terminated by the state's admission to the Union on an equal footing, the Court held, for the "extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states, were appropriate to the objects for which the United States held the territory," and thus "surely it was within the competency of the nation to secure to the Indians such a remnant of the great rights they possessed as taking fish at all usual and accustomed places." *Id.* at 384.

In *Winters v. United States*, 207 U.S. 564 (1908), the Court applied the same principles to hold that reserved Indian water rights were not repealed by a state's admission to the Union. The Court held that as the agreement reserving these rights to the Indians of the Fort Belknap Reservation was within the power of the United States to enact by legislation, these rights were not repealed by Montana's admission to the Union on an equal footing in 1889. *Id.* at 577.

The principle that a state enters the Union subject to the valid pre-existing treaty rights of Indian tribes was also upheld in *United States v. Thomas*, 151 U.S. 577 (1894) and *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906). These cases establish that the State of Wisconsin entered the

Union subject to the pre-existing Treaty rights held by the Chippewa under Article 2 of the Treaty of October 4, 1842, 7 Stat. 591. Article 2 provides that "the Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States." *Thomas*, 151 U.S. at 582. The question was whether these rights were defeated by the terms of the 1846 Wisconsin Enabling Act, which set aside section 16 of every Township for school purposes.[16] If so, they could not later have been included within the reservations set aside by the Treaty of 1854, 10 Stat. 1109.

The Court held that at the time of the Enabling Act in 1846, the lands in question already had been dedicated to Indian use by Article 2. Accordingly, the Court held that "[w]hatever right the state of Wisconsin acquired by the Enabling Act to the 16th section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized." *Thomas*, 151 U.S. at 582. The same question was presented and this holding was reaffirmed in *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906).

The unequivocal holdings of *Winans* and *Winters*, that rights reserved by treaty or agreement are not extinguished by a state's admission to the Union on an equal footing, put to rest any contrary claim.[17] The law is that states

[16] As in Minnesota, both the act admitting Wisconsin into the Union, 9 Stat. 233, and the Enabling Act, 9 Stat. 56, were silent with respect to Indian rights.

[17] The Counties (Br. at 44-47) and Landowners (*see* Br. at 47) argue that the test used to determine whether Congress intended to convey the beds under navigable waters prior to statehood, *see Shively v. Bowlby*, 152 U.S. 1 (1894), also applies to determine whether the 1837 Treaty right precludes state interference with the Indians' exercise of the right. This argument fails for three reasons. First, this Court held in *Arizona v. California*, 373 U.S. 546 (1963) that this test applies only to determine ownership of the beds of navigable waters. *Id.* at 597. Second, this Court has repeatedly rejected the application of the equal footing doctrine as a basis for invalidating an Indian right reserved by treaty or agreement, as *Winans* and *Winters* as well as all of the cases discussed above show. Third, as *Antoine v. Washington*, 420 U.S. 194 (1975) holds, the Supremacy Clause bars state interference with Indian rights reserved on ceded lands, "and neither an express provision precluding state qualification nor the consent of the State [is] required to achieve that result." *Id.* at 205.

enter the Union subject to the pre-existing treaty rights of Indian tribes, as *Thomas* and *Hichcock* hold. Taken together, these decisions also confirm, as do *43 Gallons* and *Johnson*, that a treaty right that is secured to the Indians subject only to later action by the President is not affected by statehood any more than a treaty that does not contain such a proviso.

2. *The* Ward *Decision Does Not Alter the Controlling Effect of the Decision in* 43 Gallons *and* Johnson *or Defeat the Well Settled Law That Rejects Equal Footing Attacks on Treaty Rights.*

The State argues, without addressing the controlling effect of *43 Gallons* and *Johnson*, or considering the cases just discussed, that the decision in *Ward v. Race Horse*, 163 U.S. 504 (1896) establishes that the 1837 Treaty rights were extinguished by statehood. This claim fails.

The holding of the Court in *Ward* was that Article 4 of the Treaty of 1868[18] had been impliedly repealed by the Wyoming Enabling Act, 26 Stat. 222. *Ward*, 163 U.S. at 510-11, 514-16. The Court first considered the

[18] Article 4 of the Treaty of 1868, 15 Stat. 673, provided that:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

meaning of Article 4, apparently without the benefit of a factual record of the Treaty's making.[19] From this examination, the Court concluded that the right existed only within the "hunting districts" and within such districts, only on "unoccupied lands of the United States." *Id.* at 507-08.[20] The Court further found that the right terminated as the United States transferred title to lands in the hunting districts, a matter which the Treaty left "entirely to the will of the United States" with "[n]o restraint." *Id.* at 509-10.

The Court then concluded that the Treaty right was in "irreconcilable" conflict with the Enabling Act, *id.* at 514,[21] as the former "gave them the right to exercise the hunting privilege," while the latter recognized the State's power, equal with that of other states, to regulate

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19 *Ward* came before the Court in the form of an appeal from a habeas corpus proceeding, 163 U.S. at 504-05, and without the benefit of a historical record that might have otherwise shed light on "the practical construction" or "shared expectations of the contracting parties." *Cf., Air France v. Saks*, 470 U.S. 392, 396, 399 (1985); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943). Thus, when the meaning of phrases, such as "unoccupied lands" and "borders of the hunting districts" were not clear or defined, the Court was compelled to supply a definition. 163 U.S. at 507-08. Years later, when evidence was presented regarding the understanding of the parties to that treaty, its meaning became clear. With historical records, the Idaho Supreme Court found that the subject of hunting and fishing was discussed during the negotiations, and the importance of Indian access to "game, fish and berries . . . on the unsettled lands" was clearly understood by the federal officials who negotiated the treaty; they recognized that the Indians' "traditional food gathering would have to be insured in the future." *State v. Tinno*, 94 Idaho 759, 762-64, 497 P.2d 1386 (1972).

20 That this construction essentially inverted the right as written, by construing the "hunting districts" to be the greater, and "unoccupied lands" to be the lesser, was said to be overcome by "the cardinal rule of interpretation . . . that such construction be adopted as gives effect to all the language of the statute." *Id.* at 508.

21 As we show below, this statement no longer reflects the law.

fish and game. *Id.* at 507, 509-11. This raised the question of implied repeal, on which the Court held that the silence of the Enabling Act with regard to the Treaty right, and the "fact that Congress in creating the territory expressly reserved such rights," established that the Enabling Act had impliedly repealed the Treaty right. *Id.* at 515.

That *Ward* has no application here is clear on several grounds. This is established without more by the decisions in *43 Gallons* and *Johnson*. These decisions, handed down before and after *Ward*, respectively, are controlling with regard to the effect of Minnesota's admission to the Union on treaty rights, and their force cannot be overcome by a decision construing the Wyoming Enabling Act.

Johnson is also controlling by virtue of its analysis, which establishes that a constitutionally valid treaty right is *not* inconsistent with a state's subsequent admission to the Union on an equal footing. 232 U.S. at 439. As the original 13 states are subject to constitutionally valid exercises of federal power, so too are subsequently admitted states, without offending their equality. Thus, as *Johnson* makes clear, it makes no difference that the Minnesota enabling and admitting acts do not refer to the 1837 Treaty rights, for there is no conflict between the two. *Id.*

The decisions in *Winans* and *Winters* also defeat the State's reliance on *Ward*. These cases, both decided after *Ward*, unequivocally hold that rights reserved by treaty or agreement are not repealed by a state's admission to the Union on an equal footing. The rights held under Article 5 of the 1837 Treaty are reserved rights, as the Court of Appeals correctly held, PA 56-57, and are subject to these same holdings. Indeed, if the contrary were true, and treaty rights expired upon statehood, the result would "certainly [be] an impotent outcome to negotia-

tions and a convention which seemed to promise more and give the word of the nation for more." *Winans*, 108 U.S. at 380.[22] This is not the law, as the decisions in *Thomas* and *Hitchcock*, decided before and after *Ward*, respectively, also show.

Accordingly, decisions of this Court reject the State's attempt to extend the analysis in *Ward* to this case. But even if this were not so, differences between Article 5 of the 1837 Treaty and the right at issue in *Ward* would defeat any attempt to analogize this case to *Ward*. Article 5 guarantees the rights it reserves to the Chippewa, subject only to subsequent action of the President. Similarly, the treaties in *Johnson* and *43 Gallons* left their continuing effect to the Congress, or both the President and the Congress, respectively. In contrast, *Ward* held that the Article 4 rights terminated through a process that the Treaty did not control or restrain. *Ward*, 163 U.S. at 509-10. As we have shown, when a treaty commits the continuing effect of one of its terms to the Congress or the President, or both, the treaty right is not extinguished by statehood. *Johnson*, 232 U.S. at 439, 436; *Thomas*, 151 U.S. at 584; *Hitchcock*, 201 U.S. at 213-14.

The State's attempt to show otherwise rests on the argument that *Ward*'s description of Article 4 of the 1868 Treaty as "temporary and precarious" created a category of treaty rights that do not survive statehood. Br. at 30-36. This argument fails because *Ward* did no such thing, and because in any event the 1837 Treaty right does not fit within this imagined category.

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[22] For example, the 1842 Treaty, 7 Stat. 591, ceded lands that were at that time within both the State of Michigan, which was admitted in 1837, 5 Stat. 144, and the territory of Wisconsin, which was formed in 1836, 5 Stat. 11. Article 2 of the Treaty reserved to the Indians the right to hunt and other usual privileges of occupancy, subject only to later action of the President. If the State's views were the law, Article 2 would have been invalid in Michigan *immediately* upon its proclamation.

The Court in *Ward* used the words "temporary and precarious" to describe its finding that transfers of title terminated the Article 4 right. 163 U.S. at 510, 515. It was "this view" of the right that the Court held was evidenced by a large land transfer from the hunting districts, made shortly after the Treaty. *Id.* at 509-10. This description did not, however, provide the basis for decision in the case. *Ward* turned on a finding of implied repeal. *Id.* at 511, 514. Nothing in *Ward*, or any other decision of this Court, suggests that invocation of the term "temporary and precarious" is legally sufficient to establish that a treaty right was extinguished by statehood. Indeed, this Court has never since used the term "temporary and precarious" to describe a treaty right, or to test whether a treaty right survives statehood.[23]

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[23] To the contrary, in cases involving Indian rights, *Ward* has been cited for the principle that the state retains sovereign authority to regulate the taking of natural resources within its borders, *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962), *Menominee Tribe v. United States*, 391 U.S. 404, 411 n.12 (1968), *Kennedy v. Becker*, 241 U.S. 556, 562 (1916), *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973), an interest which was reconciled with the exercise of Indian treaty rights. *Washington v. Washington Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 n.25 (1979), *Tulee v. Washington*, 315 U.S. 681, 683 n.2 (1942). *Ward* was also cited simply in comparison to the unique historical context of a land cession in *Oregon Dep't of Fish and Game v. Klamath Indian Tribe*, 473 U.S. 753, 773 n.23 (1985). In addition, *Ward* has been cited by this Court in support of other issues not pertinent here: the definition of the equal footing doctrine or state authority over wildlife in cases not involving treaties with Indian tribes, *Bolln v. Nebraska*, 176 U.S. 83, 88 (1900), *Coyle v. Smith*, 221 U.S. 559, 573 (1911), *McCabe v. Atchison, Topeka, & Santa Fe Railway Co.*, 235 U.S. 151, 159 (1914), *Virginia v. West Virginia*, 246 U.S. 565, 593 (1918), *Lacoste v. Dep't of Conservation of Louisiana*, 263 U.S. 545, 549 (1924), and in Indian cases where the Court found the equal footing doctrine inapplicable. *Ex parte Webb*, 225 U.S. 663, 690 (1912), *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 83-84 (1922); in support of the Supreme Court's jurisdiction to review a decision in a habeas corpus

In any event, Article 5 of the 1837 Treaty cannot be described as "temporary and precarious."[24] The placement of treaty rights in the hands of the President does not make such rights "temporary and precarious" any more so than does the placement of such rights in the hands of Congress. *See 43 Gallons*; *Johnson*; *Dick*. The existence of such authority does not deprive such a right of its continuing effect, as the Court of the Appeals correctly held, PA 55, nor render it "temporary and precarious." Indeed, all federal rights, except those set forth in the Constitution, are subject to subsequent action by Congress. But this does not deprive such rights of their force when in effect.

The State nonetheless contends that Article 5 is "temporary and precarious" because the 1837 Treaty does not provide a special right of access, and thus may be exercised only on public lands and private lands generally

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case, *Bryant v. Zimmerman*, 278 U.S. 63, 70 n.6 (1928); and for the rule that Congress has the constitutional power to "pass laws in conflict with treaties." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Ex parte Webb*, 225 U.S. at 683.

[24] By vesting authority in the President, the 1837 Treaty did not leave the Chippewas' hunting, fishing and gathering rights "temporary and precarious." To the contrary, as stated in the Brief of Respondents St. Croix, Lac Courte Oreilles and Sokaogan Bands, Article 5 guaranteed permanent rights to hunt, fish and gather. And whatever authority the President had to suspend the rights was not unfettered, but limited—by the common law duties of good faith applicable to parties to any contract, and here the further obligation imposed on the United States as a trustee to act in accord with the assurances that its representatives made to the Chippewa at the time of the treaty negotiations—that the President would protect their rights in good faith. The obligations imposed on the President to carry out the trust due from the United States to the Indians alone defeats the claims that his authority under Article 5 was left without restraint. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *accord United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354-56 (1941); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

open to the public, as was conceded in the District Court. PA 215 n.2.[25] This argument finds no support in *Ward*. For unlike the treaty rights there at issue, the rights held under Article 5 do not terminate as and when the United States parts with title to the land, [26] as the Court of Appeals correctly held. PA 70-71 (affirming *Mille Lacs II*, PA 334-37).[27] Accordingly, the term "temporary and precarious" has no application here, nor could that term be used to describe rights that continue to be exercised more than 160 years after they were reserved by Treaty.[28]

3. *Treaty Rights to Hunt and Fish Off-Reservation Are Not Invalidated Because the State Claims They Interfere With Its Power to Regulate Hunting and Fishing.*

The State's contention, Br. at 37, that Article 5 of the 1837 Treaty interferes with state power to regulate hunt-

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[25] This concession was confirmed by the District Court's parallel holding. PA 334-37. That such a concession has no effect on the right found to exist is well illustrated by *Antoine v. Washington*, 420 U.S. 194 (1975). In *Antoine*, the Indian hunters "apparently claim[ed] no right to hunt on fenced private property." *Id.* at 208 n.11. That concession not only did not deprive them of the remaining right, it was found to *avoid* "serious questions." *Id.*

[26] The rights reserved by Article 5 are rights to engage in *the activity* of hunting, fishing and gathering in areas that are otherwise open to public hunting and fishing. *See* Brief of Respondent Mille Lacs Band, at sec. I.B. The rights exist independent of any interest in the land, and by virtue of the Supremacy Clause, preempt inconsistent state regulation. *See Antoine v. Washington*, 420 U.S. 194, 205 (1975).

[27] The State did not seek review of this ruling, and in fact, the State does not contend otherwise here.

[28] There is no merit in the State's attempt to label Article 5 "temporary and precarious" because as a practical matter access to ceded lands is needed to exercise the right. Br. at 34-6. All rights are subject to limitations that, as a pratical matter, may impede or limit their exercise, but this does not make such rights terminable.

ing and fishing and is thus invalid fares no better. For this contention has also been rejected by decisions which the petitioners ignore.

The law is settled that state authority to regulate fish and game "is . . . not absolute in the face of federal regulation and certain federally protected interests." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 386 (1978), and does not "preclude the proper exercise of a federal power." *Id.* It is also established that the state's authority to regulate the taking and sale of natural resources must yield when its exercise would interfere with rights protected by treaties made by the United States, whether with foreign nations, *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920), *Asakura v. Seattle*, 265 U.S. 332, 341 (1924),[29] or Indian tribes. *Antoine v. Washington*, 420 U.S. 194, 204 (1975); *Washington v. Washington Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691-92 (1979).

In *Antoine*, the Court specifically rejected an argument that "Congress is not constitutionally empowered to inhibit a State's exercise of its police power" by ratification of an agreement with a tribe that reserved the tribe's hunting rights on ceded land, "to which the State is not a party." 420 U.S. at 201. As this Court explained:

[29] In *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920), this Court held that the state's power to regulate the killing of game was required to give way to the requirements of the Migratory Bird Treaty Act. In *Asakura v. Seattle*, 265 U.S. 332, 341 (1924), the Court held that a city's sovereign authority did not permit it to limit the availability of business licenses to only United States citizens where a treaty between the United States and Japan required that Japanese citizens residing within the United States be allowed the same opportunities to engage in trade or business as United States citizens. As the Court stated, "[t]he treaty is binding within the state . . . . The rule . . . established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as the provisions of the Constitution and laws of the United States." *Id.*

> [T]he fallacy in that proposition is that a legislated ratification of an agreement between the Executive Branch and an Indian tribe is a "[Law] of the United States . . . made in Pursuance" of the Constitution and, therefore, like "all Treaties made," is made binding upon the affected States by the Supremacy Clause.

Id. Thus, by virtue of the Supremacy Clause, treaties are " 'superior and paramount to the authority of any State within whose limits are Indian tribes.' " *Id.* at 204 (quoting *Dick v. United States*, 208 U.S. 340, 353 (1908)).[30] Furthermore, as the Court held, "neither an express provision precluding state qualification nor the consent of the State was required to achieve that result." *Id.* at 205.

II. PETITIONERS' RELIANCE ON *WARD v. RACE HORSE* HAS NO MERIT BECAUSE SUBSEQUENT DECISIONS OF THIS COURT HAVE RECONCILED TREATY RIGHTS WITH STATE REGULATORY AUTHORITY AND REJECTED THE BASIS OF *WARD*'S HOLDING OF IMPLIED REPEAL.

Even assuming *arguendo* that the facts in this case were theoretically like *Ward*, and that the authorities just discussed were not dispositive of the equal footing claim made here, subsequent decisions of this Court have altered the principles on which *Ward* was based, and make it clear that *Ward* may no longer be relied on to show that

[30] The Court gave effect to these same principles in *Washington Passenger Fishing Vessel Ass'n*, 443 U.S. at 689-92, when the Court held that state law regulating fishing must yield to the provision contained in a 1930 Convention between the United States and Canada regarding allocation of salmon, and federal regulations implementing that Convention with regard to its impact on the Indians' reserved fishing rights. As the Court explained, "[t]o the extent that any . . . State statute imposes any conflicting obligations, the statute is without effect . . . and must give way to the federal treaties, regulations, and decrees." *Id.* at 691-92.

an off-reservation treaty right has been extinguished by a state enabling act. First, since *Ward*, this Court has reconciled Indian treaty rights with state regulatory authority over natural resources, replacing what the Court in *Ward* saw as an irreconcilable conflict between the two with the "conservation necessity" standard first set out in *Tulee v. Washington*, 315 U.S. 681 (1942), and consistently followed since then. As the Court of Appeals correctly held, this change in the law defeats the claim that the Treaty right conflicts with the State's sovereignty. PA 57-58. Additionally, the foundation of *Ward*'s holding that the 1868 Treaty right was impliedly repealed by the State Enabling Act has since been rejected. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561-63 (1983). It is now clear that the presence or absence of a reservation of Indian rights in a state enabling act is not sufficient to establish congressional intent as to the existence of such rights. Finally, the law now requires that the standard set forth in *United States v. Dion*, 476 U.S 734 (1986)—a "clear and plain" intent to abrogate—be met before a treaty right will be held to have been repealed by an act of Congress. That standard is not and cannot be met here, as the Court of Appeals correctly held. PA 59.

A. This Court Has Reconciled Indian Treaty Rights With the State's Regulatory Authority Over Natural Resources.

The State argues that "[t]he Bands' 1837 treaty privilege to hunt and fish off-reservation outside of state law is irreconcilable with the State's ability to enforce its laws uniformly as to all persons within its jurisdiction." Br. at 37. This Court rejected that argument more than fifty years ago in *Tulee v. Washington*, 315 U.S. 681 (1942), and, as the lower courts correctly found, PA 57-58 & n.43, established a standard by which Indian treaty rights can be reconciled with the state's interest in regulation of

natural resources. This standard has served as the framework within which the courts, states and tribes—including the parties to this case—have since very effectively resolved these issues and there is no valid reason to depart from it.

Relying on state sovereign authority over natural resources as described in *Ward v. Race Horse*, 163 U.S. 504, 507 (1896) and *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), the State in *Tulee* argued that the Indians' treaty rights could not impair the State's authority to impose licensing requirements and fees on all fishermen, including a Yakima Indian fishing off-reservation under a treaty that reserved to the Indians the right to fish at usual and accustomed places in common with all state citizens. 315 U.S. at 683-84. The Yakima Indian countered that he had an exclusive right to take fish off-reservation "free from state regulation of any kind." *Id.* at 684. This Court rejected both positions, holding that "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature . . . as are necessary for . . . conservation." *Id.* Applying that test to the license fee at issue, the Court found that the fee served both regulatory and revenue-raising purposes, but that the "regulatory purpose could be accomplished otherwise, . . . the imposition of license fees [wa]s not indispensable to the effectiveness of a state conservation program." *Id.* at 685. The Court further noted that "[e]ven though this method may be both convenient and, in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve," a result that could not "be reconciled with a fair construction of the treaty." *Id.*

This Court has since consistently relied on the "conservation necessity" standard set out in *Tulee* to reconcile the state's regulatory authority as described in *Ward* with

Indian off-reservation treaty rights.[31] In *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), this Court described the standard, stating that the treaty right:

> may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States . . . . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

Id. at 398 (citations omitted).

Applying that standard, the Court in *Department of Game of Washington v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*), held that a state regulation which banned all commercial net fishing of steelhead impermissibly interfered with the Indians' treaty fishing right. The Court found: "There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed," *id.* at 48, and "invalidat[ed] the ban on Indian net fishing and remand[ed] the case with instructions to the state courts to determine the portion of harvestable steelhead that should be allocated to net fishing by members of the tribe." *Washington Passenger Fishing Vessel Ass'n*, 443 U.S. at 683 (describing *Puyallup II*, 414 U.S. at 48-49). On remand, the state court made an accommodation by setting aside a portion of the steelhead run for Indian net fishermen. This Court affirmed, finding the action to be

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31 In *Ward*, the Court said that if the Indian position were upheld there would be complete immunity from state regulatory authority, *see* 163 U.S. at 509—an issue not posed here, as the Chippewa do not dispute the application of state regulatory authority as provided under the "conservation necessity" standard since established by this Court.

an appropriate state regulation "narrow in scope and well-suited to effect a minimum of intrusion on the treaty right." *Puyallup Tribe v. Washington Game Dep't*, 433 U.S. 165, 177-78 & n.18 (1977) (*Puyallup III*).

The "conservation necessity" standard was subsequently reaffirmed. In *Antoine v. Washington*, 420 U.S. 194, 207 (1975), it was applied to bar enforcement of state deer hunting seasons against an Indian exercising an off-reservation treaty hunting right.[32] And in *Washington v. Washington Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court rejected arguments that the treaties reserved to the Indians no more rights than those enjoyed by non-Indian citizens of the state, but recognized state authority to regulate for conservation. As the Court stated, "nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, [but] treaty fishermen are immune from all regulation save that required for conservation." *Id.* at 682 (citing *Antoine*, 420 U.S. at 207-8; *Puyallup I*, 391 U.S. at 398; *Tulee*, 315 U.S. at 684; *Winans*, 198 U.S. at 384; and *Ward*, 163 U.S. 504); *accord Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n.16 (1985) (reiterating standard).

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32 In so ruling, the Court explained that although the Indians' off-reservation rights were "not exclusive and [were] to be enjoyed 'in common with all other persons'" that did not affect "the Supremacy Clause's preclusion of qualifying state regulation." 420 U.S. at 206. The Court further explained that while the state might regulate Indian hunting, it could only do so upon a showing that the state regulation was necessary for conservation. "[T]he State must demonstrate that its regulation is a reasonable and necessary conservation measure, . . . *and* that its application to the Indians is necessary in the interest of conservation." *Id.* at 207 (citations omitted). Since the state there had "not argued, let alone established, that applying the ban on out-of-season hunting of deer by Indians [was] in any way necessary or even useful for the conservation of deer," it could not enforce that ban against an Indian exercising treaty rights. *Id.* at 207.

Significantly, this Court's rulings in *Tulee*, the *Puyallup* trilogy, *Antoine* and *Washington Passenger Fishing Vessel Ass'n* established a framework within which the state's and tribe's respective rights and interests can be addressed, accommodated and reconciled. The framework protects the state's sovereign interests, as early expressed in *Ward*, in management of natural resources for the benefit of all persons within the state. At the same time, to give effect to the obligations imposed by treaty, the standard properly requires that the state accommodate Indian rights, and for that purpose limits state authority to regulate Indian treaty rights to measures necessary for conservation.

The resulting framework has since been relied upon by the courts, states and tribes to effectively balance those interests.[33] Indeed, this framework provided the basis on which the Chippewa and the State successfully reached agreements on "the vast majority" of regulatory issues of concern to the State. *See* n.4, *supra*. The few regulatory issues on which the Bands and the State could not agree were presented to and resolved by the District Court, which correctly decided the matters by applying the "conservation necessity" standard as established by this Court to the evidence presented.[34] The State did not challenge any

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[33] *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1238-42 (W.D.Wis. 1987); *United States v. Washington*, 384 F. Supp. 312, 340-42 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). And although this Court has stated that the only permissible state regulation of an Indian treaty right is that necessary for conservation, the lower federal courts, including the courts in this case, have further concluded that the state may permissibly regulate in the interest of public health and safety. *See Lac Courte Oreilles Band*, 668 F. Supp. at 1238-42; *Mille Lacs v. Minnesota*, PA 344-45; *Fond du Lac v. Carlson*, PA 447-51. The stipulated code in this case reflects these requirements.

[34] *See* PA 85-87, 92-101, 114-116. The District Court properly applied this standard to the matters before it. The State reaches a contrary conclusion by reciting one portion of the District Court's ruling out of context. Where the state regulation at issue authorized the State to make management decisions based not only on conservation needs, but also to provide "recreational opportunities," PA 90, the District Court correctly found—similar to this Court in *Tulee*, 315 U.S. at 685—that State decisions on such matters were not per se unreviewable but that enforcement of the state regulation would only be allowed upon a showing of conservation necessity. PA at 90-101. The same was true of the state regulation on shining deer. Because the State failed to show a conservation need—as opposed to "recreational concerns," PA 119—the District Court concluded that this prohibition could not be enforced against the Bands. The court further found that even if a conservation need were shown, the State failed to establish that a complete prohibition was necessary to meet a conservation objective, much less that this was the least restrictive alternative. PA 120. Likewise, the District Court's conclusion that State decisions regarding the "harvestable surplus" of a species were not per se unreviewable by the federal court did no more than permit either party to invoke the federal court's jurisdiction should a dispute about application of the "conservation necessity" standard arise. PA 87-101.

aspect of those regulatory rulings in the Court of Appeals, nor the "conservation necessity" standard on which the District Court's decision and the parties' comprehensive stipulation were based. *See* n.6 *supra*. Instead, the State assured the Court of Appeals that the District Court's ruling did not have any detrimental effect on the resources, n.7 *supra*, and the Court commended the parties for their work in resolving regulatory issues. PA 65, 73.

Minnesota's contention here that the legal framework established by the "conservation necessity" standard is unworkable, Br. at 37-38, is untimely and based on speculation that is belied by the parties' ability to effectively resolve the vast majority of all such issues in this case.[35]

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[35] The assertion is further refuted by the history of the exercise of these treaty rights in Wisconsin under a regulatory framework that is very similar to the one agreed upon in this case. As discussed in the Brief of Respondents Bad River Band and Lac du Flambeau

Its claim that under the lower court's decisions the State's management authority will be "sharply curtailed," Br. at 37, cannot be supported by a belated attack on those parts of the District Court's decision that the State did not deem sufficiently erroneous or important to challenge on appeal.[36] And the State's speculation that it will "operate under perpetual federal court supervision," Br. at 37, is simply not supported by framing as hypothetical future resource management issues, Br. at 39, matters that were in *fact* resolved by agreement between the Bands and Minnesota without federal court involvement.[37] In sum, there is simply no reason to believe that the existing legal framework that enabled Minnesota and the Bands to reach agreement on most issues affecting natural resources does not work, or that the spirit of cooperation reflected

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Band of Chippewa, in the years since final judgment was entered in *Lac Courte Oreilles Band v. Wisconsin*, 775 F. Supp. 321 (W.D. Wis. 1991), the parties to that case have not found it necessary to invoke the federal court's jurisdiction to resolve any issue relating to the State's regulation or management of natural resources. Nor has the exercise of the treaty right given rise to any conservation concern about the resources. To the contrary, Chippewa input on natural resource management has served to enhance those resources for the benefit of all residents of the State.

[36] *See Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . ."). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 61 n.10 (1996).

[37] *Cf.*, JA 1771-72, 1780-84 (agreement on methods for determining harvestable surplus); JA 1768 (agreement that change in boundaries of state parks and special use areas *not* subject to judicial review); Docket Entry No. 689 in *Mille Lacs v. Minnesota* at, *e.g.*, Ex. A, § 3.06A (agreement to prohibit introduction of acquatic species by Bands), Ex. C (agreement to restrict Band hunting, fishing and gathering in state parks and state special use areas).

by the parties' agreement will not continue. And the fact that the federal courts remain open should a dispute arise that the parties are unable to resolve is—without question—squarely within the settled authority of the federal courts, *see Washington Passenger Fishing Vessel Ass'n*, 443 U.S. at 695-96, and will serve to protect the interests of all parties to this litigation.

B. The Presence or Absence of Disclaimer Clauses in State Enabling Acts Is Not Determinative of the Existence of Indian Rights.

The view taken in *Ward* advanced by the State here, Br. at 36-7, that the presence or absence of a reservation of Indian rights—or "jurisdictional disclaimer"—in a state's enabling act reflects congressional intent can no longer be maintained. This is shown by this Court's decision in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), which considered whether States that had been admitted to the Union pursuant to Enabling Acts that contained jurisdictional disclaimers have authority to adjudicate Indian water rights pursuant to the McCarran Amendment, 66 Stat. 560, 43 U.S.C. § 666.[38]

Arizona shows that the presence or absence of language in a state enabling act that reserves federal authority over Indian rights is not reflective of Congress' intention one way or the other. Rather, the presence or absence of such a term "has more to do with historical timing than with deliberate congressional selection." 463 U.S. at 562. As the Court explained (*id.*):

> In 1882, this Court held in *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869, that the federal courts in Colorado had no criminal jurisdiction in a

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[38] The case was a sequel to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), which upheld the power of the states with enabling acts that did not contain such disclaimers to hear such cases.

murder committed by one non-Indian against another on an Indian reservation, pointing out that the case did not concern "the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians." *Id.*, at 624, 26 L.Ed. 869. We also suggested, however, that the result might have been different if Congress had expressly reserved all criminal jurisdiction on Indian reservations when Colorado was admitted to the Union, pointing to a similar disclaimer contained in the legislation by which Kansas was admitted to statehood in 1861. *Id.*, at 623-624, 26 L.Ed 869; *see The Kansas Indians*, 5 Wall 737, 18 L.Ed 667 (1867). Probably in response to the *McBratney* decision, Congress resumed the practice of including reservations in Enabling Acts, and did so in the case of virtually every State admitted after 1882.

In *Arizona*, the Court declined, "[i]n light of this history," to construe the Arizona and Montana Enabling Acts, *id.* at 563, although both included specific jurisdictional disclaimers. *Id.* at 556, 558-9. Instead, the Court decided the case by construing the statute there at issue, the McCarran amendment, without regard to the effect, if any, of the enabling acts. *Id.* at 564 n.15. This course was informed by an examination of this Court's precedents, which showed that the presence of such a disclaimer had afforded no protection from state jurisdiction in *Draper v. United States*, 164 U.S. 240 (1896) and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), while at the same time, the decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), "perhaps the most expansive declaration of Indian independence from state regulation ever uttered by this Court, pertained to one of the original 13 States, unbound by any Enabling Act whatsoever." *Arizona*, 463 U.S. at 562-63.

Thus, the absence of such a disclaimer in the Minnesota enabling and admitting acts does not indicate congressional intent with regard to whether Indian rights are to be continued in force in the State. Minnesota, having been admitted in 1858, more than two decades before the Court's suggestion in *McBratney* of the possible significance of such disclaimers, was not admitted with a disclaimer in its enabling or admitting acts. But this fact alone gives no indication of congressional intent, as *Arizona* shows.

Indeed, given this Court's holding in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), decided just five years before the 1837 Treaty was entered into, there would have been no reason for Congress to believe it necessary to include such disclaimers in order to preserve the 1837 Treaty rights. For if the rights of Georgia, as one of the original 13 states, did not trump the Cherokee treaty rights there at issue, Minnesota plainly would not be denied admission to the Union on an equal footing by reason of the 1837 Treaty right.

Even if such a contrary argument could plausibly be advanced, well-settled law concerning the effect of Minnesota's admission to the Union compels its rejection. For it is established that the absence of a disclaimer did not void federal jurisdiction over Indian affairs in Minnesota, or terminate pre-existing treaty rights, as *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876), *United States v. LeBris*, 121 U.S. 278 (1887) and *Johnson v. Gearlds*, 234 U.S. 422 (1914) plainly show.

C. *United States v. Dion* Establishes That Treaty Rights Are Not Subject to Repeal in the Absence of a Clear and Plain Showing of Congressional *Intent to Terminate the Right.*

Ward's holding that Wyoming's Enabling Act repealed the 1868 Treaty right there at issue has no force here for an additional reason. In *Ward*, this conclusion was reached without any indication of actual congressional awareness

of the conflict that the Court found to exist between the treaty right and the state enabling act, much less any showing that Congress decided to resolve such a conflict by terminating the 1868 Treaty right. This Court's decision in *United States v. Dion*, 476 U.S. 734 (1986) establishes that such a showing is essential to find that a treaty right has been abrogated by Congress.

As a unanimous Court held in *Dion*, for a treaty right to have been terminated by a subsequent statute, it is "essential" that there be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *Id.* at 739-40. *See also Washington Passenger Fishing Vessel Ass'n*, 443 U.S. at 690 ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) ("intention to abrogate or modify a treaty is not to be lightly imputed to the Congress"); *Cook v. United States*, 288 U.S. 102, 120 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."); *United States v. Payne*, 264 U.S. 446, 448 (1924) ("an intention to alter, and, pro tanto, abrogate, the treaty, is not to be lightly attributed to Congress").

The *Dion* standard cannot be met by reliance on Minnesota's Enabling Act or Act of Admission because there is no indication that Congress was aware of the conflict that the State claims to exist between the 1837 Treaty

[39] Both District Court judges reached the same conclusion on this issue. *Fond du Lac*, Order of March 18, 1996, PA 454; *Mille Lacs*, Order of March 29, 1996, PA 188-89.

right and these Acts, much less any indication that Congress chose to resolve such a conflict by terminating the 1837 Treaty right. As the Court of Appeals correctly held,[39] the defendants in the Court below presented no evidence "from which [the Court] could conclude that Congress intended to abrogate the 1837 Treaty rights" upon Minnesota's admission to the Union. PA 59.[40]

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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[40] Finally, even if the State's construction were plausible, it would necessarily be rejected by the rule of construction that ambiguities in treaties or statutes affecting Indian rights must be construed in favor of the Tribes. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973).

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